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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 527

THEO MOSELY,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. TOM WATSON,
Counsel for Petitioner.

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No. 527

THEO MOSELY,

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vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named Petitioner respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the U. S. Court of Appeals for the Fifth Circuit entered in the above entitled case on the 10th day of December, 1953 (Page 63, Transcript of Record), being its Order denying a Petition for Rehearing; and its decision and judgment entered on the 18th day of November, 1953 (Page 52, Transcript of Record), affirming the final judgments and sentence of the District Court of the United States in and for the Southern District of Florida; the latter having been originally entered in the trial of said cause on the 27th

day of August, 1952 (Page 35, Transcript of Record), and the 1st day of April, 1953 (Page 41, Transcript of Record).

I

Opinions Below

1. The Trial Court's Order, appearing on Page 41 of the Transcript of Record, dated April 2, 1953, is the only opinion emanating from that Court. It is a combination order and opinion. There is a judgment by said Trial Court on Pages 35 and 36 of Transcript of Record, imposing against Petitioner a $2,000.00 fine, and a one year sentence.

2. The opinion of the C. C. A. for the Fifth Circuit appears on Page 50 of the Transcript of Record, as rendered in affirming the judgment of the Lower Court.

3. The Order of said C. C. A., appearing on Page 52 of the Transcript of Record, is that Court's Order affirming said Lower Court's judgments.

4. The Order of said C. C. A., appearing on Page 63 of the Transcript of Record, is the only Order or opinion rendered by that Court on the Petition for Rehearing.

II

Statement Disclosing Jurisdiction of Supreme Court of the United States to Review the Judgment Involved

(a) Cases from Circuit Court of Appeals may be reviewed in the Supreme Court of the United States by Writ of Certiorari (Title 28, Section 1254(1), USCA).

(b) Petition for review of Writ of Certiorari (Rule 37(b), Federal Rules of Criminal Procedure).

(c) Review on Writ of Certiorari of decisions of Circuit Courts of Appeal (Supreme Court Rule 38(1), Title 28, USCA).

This Petition is accompanied by a certified Transcript of Record in the case, including all additional proceedings in

the Court to which the Writ is asked to be directed; and the jurisdiction of the Supreme Court of the United States is invoked under the Federal Law and Rules of Court above cited, upon the contention:

1. That the United States Court of Appeals for the Fifth Circuit has, in its decision rendered in this case, (a) departed from the accepted and usual course of judicial proceedings; (b) or sanctioned such a departure by the Lower Court; as to call for an exercise of the power of supervision of the United States Supreme Court; or,

2. That said C. C. A. has decided a Federal question of due process in a way probably in conflict with applicable decisions of the Supreme Court of the United States, and in doing so, has violated established legal proceedings; or,

3. Has decided an important question of local law in a way probably in conflict with applicable local decisions, not proceeding according to essential legal requirements.

III

The Matter Involved

The matter involved is a conviction of the Petitioner in the District Court of the United States for the Southern District of Florida; affirmed by the United States Court of Appeals for the Fifth Circuit. The charges in said conviction being those set forth in the Information, printed on Pages 3 and 4 of the Transcript of Record, but only the second count thereof. After arraignment and a plea of "nolo contendere" entered by the Defendant (which plea was entered upon special circumstances to be hereinafter fully pointed out); the first count of said Information was withdrawn by the U. S. Prosecuting Attorney, and the Defendant's trial concluded before the Judge without a Jury; and Defendant's conviction and sentence imposed under the second count alone; which second count charged, or

charges, *willful* failure to *register*, and *willful* failure to *pay* the special tax required to be paid by sub-chapter B of Chapter 27A, Sections 3290 and 3291 of Title 26, U. S. Code; charging the same to have taken place after the Defendant engaged in carrying on the occupation of accepting wagers as defined in said Chapter 27A and Title 26, by Section 3285, subsection (b)(1)(c) thereof, to-wit: wagers placed in a lottery conducted for profit.

IV

The Questions Presented

The questions presented in this case are:

(1) Petitioner has not been proceeded against with due process, and has not had a fair trial.

(2) The proceedings against Defendant in the Trial Court, leading up to the sentence and judgment appealed from, are not conformable with due process, and the Circuit Court of Appeals should have, for these reasons, ordered a new trial.

(3) The Information purports to charge a felony without a Grand Jury finding or investigation, and is therefore invalid.

(4) The Information is faulty and insufficient in charging the offense that it purports to embrace, under which Defendant's conviction was accomplished.

(5) The C. C. A., upon being advised in the Petition for Rehearing (Pages 53 to 62, 61), Transcript of Record), that the Supreme Court of Florida had reversed the conviction of the Defendant Theo Mosely by the State Trial Court, on the gambling charge upon which his alleged Federal crime was predicated, should have ordered a new trial in order to permit him to file his "not guilty" plea.

(6) The Federal Law involved violates the Constitution of the State of Florida.

(7) The Federal Law involved violates the Constitution of the United States.

V

Reasons Relied On for the Allowance or Granting of the Certiorari Writ

A—WE WOULD FIRST CALL ATTENTION TO THE SUBSTANTIALNESS OF THESE REASONS, AS SAME FIND PREMISE FROM THE FOLLOWING BACKGROUND DEVELOPING IN THE TRIAL OF THE CASE.

Background

(a) In the Trial Court, Petitioner, with his wife, Hazel Mosely (a joint Defendant, but she was not a party to the appeal to C. C. A., nor to this Petition), was put on trial under the second count of the Information (Page 4 of Transcript of Record), having been previously subjected to a confession quest by Federal Treasury Department Officers. This quest was made *before* their *arraignment* or *plea*, in the Court; and the fact that these two Defendants had signed a confession statement under such quest, was not known by this Petitioner's Counsel until 15 minutes prior to the beginning of his trial. The case had actually been called by the Court for trial, when U. S. Attorney advised Petitioner's Attorney that said U. S. Attorney had, and held, *and intended to use* in the trial, a confession. The Defendant Mosely had not advised his Attorney of such alleged confession, because he was an ignorant negro and had been led to believe, by the Federal Officers, that the prosecution in the State Court—herein referred to elsewhere—for conducting a lottery, made him liable for Federal prosecution under the licensing and taxing anti-gambling Federal Law heretofore referred to.

(b) Mosely's Counsel had no opportunity to make inquiry concerning the legality of the confession, being then and there called upon by the Court, in the pending trial,

to enter a plea. Under these conditions and circumstances, Mosely's Counsel did not have the temerity to do other than enter a plea of "nolo contendere", at the same time requesting the Court not to impose sentence then (See Pages 11, 12 and 13 of Transcript of Record). Counsel could not ask for a continuance of the case, as the Court was insisting upon the Defendant entering his plea. Counsel's only way out of the dilemma that seemed fitting, was the "nolo contendere" plea, and a request for withholding of sentence, having in mind the making of an investigation re the obtaining of said confession, and the right to request leave to withdraw the "nolo contendere" plea to enter a "not guilty" plea, at the time when the case should be called for sentence and judgment.

(c) On August 22, 1952, a date prior to his sentence and final judgment, Theo Mosely filed in the Clerk's Office a motion to suppress the confession and a plea of "not guilty" (Pages 15 and 16 of Transcript of Record), which two pleadings were presented to the Court on August 27, 1952, when the case came on for sentence, with the request that the "nolo contendere" plea be discarded and "not guilty" received. These two pleadings were denied by the Court (See Pages 17 to 28 inclusive, Transcript of Record). This was within 10 days after entry of plea (Title 18, Section 3772, USCA).

B—THE FOREGOING BACKGROUND PRESENTS THE FOLLOWING FACTUAL CONDITIONS WHICH THEO MOSELY SUFFERED UNDER.

(a) A denial by the Court to permit him to be tried before a Jury under a "not guilty" plea.

(b) The surreptitious use of an alleged confession by the Prosecution.

(c) The Court's denial of Theo Mosely's effort to show that such alleged confession had been illegally obtained,

and was not a voluntary one, but was obtained through intimidation and fear, and under duress, after having been led to believe by Federal Officers that he had violated some Federal Law.

C—THE FOREGOING BACKGROUND ALSO PRESENTS THE FOLLOWING VIOLATIONS OF MOSELY'S LEGAL RIGHTS.

(a) The Trial Court should have required the production of the alleged confession, which the Prosecution had so surreptitiously used in obtaining the Defendant's "nolo contendere" plea, since Defendant had made a timely motion therefor.

(b) The Trial Court improperly abdicated its obligation to ascertain whether, under all of the circumstances of the case, the claimed confession was legal, genuine and real; and abdicated its obligation to ascertain the extent to which such alleged confession had influenced the Appellant's conviction.

(c) The two preceding omissions (C-(a) (b)) by the Trial Court were a serious deprivation of Defendant's rights to due process; and since the alleged confession was obtained previous to arraignment, and the motion for its suppression was made previous to sentence and judgment; it was a serious deprivation of Theo Mosely's rights to due process in obtaining a fair trial, when a Trial Court, having been furnished substantial grounds for inquiring into whether the Prosecution had failed to produce all reasonable available evidence to clear charges of coercion in procuring an alleged confession, fails or refuses to make such inquiry. The C. C. A. should have ordered a new trial so as to permit, and make, adequate search for the truth.

(d) The matters of fact and law hereinabove outlined, conclusively present a case where alleged confessions were used as the basis of conviction; and when such has been

made to appear, it has been definitely and finally laid down as a rule of decision in the Federal Courts, that the Trial Court should satisfy itself before conviction, as to the following:

(1) Under what circumstances was the confession obtained?

(2) Has the use of the confession been repugnant to that fundamental fairness essential to the very concept of justice?

Stein v. *New York* (U. S.), 97 L. Ed. 1522 (and note Page 1555), 346 U. S. 156, 73 Sup. Ct. 1077;

Lisenba v. *California*, 314 U. S. 219 (Page 236), 86 L. Ed. 166 (Page 179).

The Trial Court having denied a new trial, the Appellate Court (C. C. A.) should have ordered same.

In addition, the Supreme Court of the United States has adopted a further rule of decision for Federal Courts that *denies* admission to confessions that have been *obtained* or *procured prior to arraignment.*

Brown v. *Allen*, 97 L. Ed. 469, Page 499, citing;

McNabb v. *U. S.*, 318 U. S. 332, 87 L. Ed. 819;

Upshaw v. *U. S.*, 335 U. S. 419, 93 L. Ed. 100.

The alleged confession in this case was obtained prior to the arraignment of Theo Mosely (see statement of U. S. Prosecuting Attorney, Mr. O'Brien, Pages 11 and 12, Transcript of Record). It is true that the alleged confession was not put in evidence in the trial of the case, but this was so because of the Defendant's "nolo contendere" plea. The Trial Court, however, by refusing to require its production, and considering its suppression, under the Defendant's motion therefor; in effect permitted it (the alleged confession) to serve as evidence, and to be the basis for Defendant's conviction.

Reasons Continued

With the preceding background presented, we continue with our "reasons relied on for the writ", taking for discussion the "questions presented" in their order set forth in IV above:

As to Question (1)

PETITIONER HAS NOT BEEN PROCEEDED AGAINST WITH DUE PROCESS, AND HAS NOT HAD A FAIR TRIAL.

As to Question (2)

THE PROCEEDINGS AGAINST DEFENDANT, IN THE TRIAL COURT LEADING UP TO THE SENTENCE AND JUDGMENT APPEALED FROM, ARE NOT CONFORMABLE WITH DUE PROCESS, AND THE C.C.A. SHOULD HAVE ORDERED A NEW TRIAL.

We take the first two questions together.

The Defendant below and Petitioner here, in the Trial Court was denied the right of proving his innocence of the offenses charged against him, and the right of a trial by Jury, after he had presented a reasonable showing of being entitled to the opportunity of so doing.

Upon the Defendant's motion in the Trial Court to produce and suppress the alleged confession, the Trial Court should have required such production, and, upon investigation of the manner in which said alleged confession had been obtained, it should have suppressed the same as not having been voluntarily given, and should have allowed the Defendant to withdraw his "nolo contendere" plea and go to trial upon a "not guilty" plea. The Court prejudiced the Defendant's right to a fair trial under due process, in not inquiring into and ascertaining the validity of said alleged confession; and the United States Court of Appeals should have reversed the judgment and sentence of the District Court, because of said Trial Court's failure to make such

inquiry, and this Defendant should have been given a new trial by said Court of Appeals.

The action of the Trial Court amounted to an abuse of its discretion, in refusing the Defendant's motion to withdraw his "nolo contendere" plea and enter a plea of "not guilty", under the circumstances and conditions supporting the filing of such motion.

The denial by the Trial Court of the Defendant's motion to go to trial on a "not guilty" plea, after said Trial Court had permitted the United States to withdraw the first count of the Information, and to proceed only on a second count, was error, for which a new trial should have been ordered by the Court of Appeals.

When a Trial Court refuses to permit Defendant to withdraw plea of guilty, the Defendant has his remedy by appeal from judgment of conviction.

Lynch v. *Smoke*, C. C. A. California, 1949, 172 Fed. 2d 301.

As to Question (3)

THE INFORMATION PURPORTS TO CHARGE A FELONY WITHOUT A GRAND JURY FINDING OR INVESTIGATION, AND IS THEREFORE INVALID.

Because of the invalidity in the Information, pointed out in the #3 "Question presented", the Defendant should have been given a new trial by the Court of Appeals. He should not have been prosecuted upon an Information charging a felony that had been filed by the U. S. Attorney without any investigation by a Grand Jury. Under Federal Law, felonies are required to be investigated by Grand Juries, and prosecutions therefor to be upon Grand Jury indictment.

In a book entitled "Federal Rules of Criminal Procedure", with notes prepared under the direction of the Advisory Committee, appointed by the U. S. Supreme Court, with an introduction by the Honorable Tom Clark,

while Attorney General of the United States, published and copyrighted by the New York University School of Law in 1946, on Page 16 there is a note, under Rule 7, reading as follows:

> "1. This rule gives effect to the following provision of the Fifth Amendment to the Constitution of the United States:
>
> 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *'.
>
> "An infamous crime has been defined as a crime punishable by death or by imprisonment in a penitentiary, or at hard labor.
> *Ex parte Wilson*, 114 U. S. 417 (427);
> *U. S. v. Moreland*, 258 U. S. 433.
>
> "Any sentence of imprisonment for a term of over one year may be served in a penitentiary, if so directed by the Attorney General (18 U. S. C. 753f) * * *. Consequently, any offense punishable by imprisonment for a term of over one year is an infamous crime.
> "2. Petty offenses and misdemeanors, for which no infamous punishment is prescribed, may now be prosecuted by Information. 18 USC 541.
> *Duke v. U. S.*, 301 U. S. 402."

Rule 7, Federal Rules of Criminal Procedure, provides that an offense which may be punished by imprisonment for a term exceeding one year, shall be prosecuted by Indictment of Grand Jury.

The Defendant in this case at no time waived Indictment.

An Information may be amended, an Indictment may not.

As heretofore stated, the Prosecution in this case abandoned the first count of the Information, and proceeded upon the second count only. This second count, in charging the offenses described in it as having been willfully committed, charged a felony, which under the law must have

been prosecuted under Indictment by a Grand Jury, unless the Defendant waived such Indictment. In the second count of the Information in this case, the Defendant is charged with willfully violating the provisions of Sections 3290 and 3291 of Title 26, USC.

The penalties prescribed for violating these two sections are set forth in Section 3294 of Title 26, USC. Among these penalties is that for willfully violation (Title 26, Section 3294(c)); which is made known by reference to Section 2707, Title 26, USC, as containing the penalty provision. The only portion of Section 2707, Title 26, *supra*, that could be said to prescribe the penalty for willful evasion is subparagraph (c) thereof, providing: "and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall in addition to other penalties provided by law, be guilty of a FELONY, and upon conviction thereof be fined for not more than $10,000, or imprisonment for not more than five years, or both, etc."

As to Question (4)

THE INFORMATION IS FAULTY AND INSUFFICIENT IN CHARGING THE OFFENSE THAT IT PURPORTS TO EMBRACE, UNDER WHICH DEFENDANT'S CONVICTION WAS ACCOMPLISHED.

The Information, under which the Defendant has been prosecuted, in this case, in each of the counts thereof, attempts to charge two offenses. The combined offenses being separately provided for in Sections 3290 and 3291 of Title 26, USCA, respectively; these two offenses, however, are jointly embraced in each of the separate counts against two Defendants. The only difference between the counts, as to their allegations and contents, being the first count, which was withdrawn by the Prosecution, does not allege "willful" conduct by the Defendant, and the second count does.

Rule 8(a) "Federal Rules of Criminal Procedure" forbids joining more than one offense in the same count against one Defendant. Rule 8(b) (same) requires that when two Defendants are charged in the same Information, the charge must relate to the same offense. The Information in this case contains, in both counts, the same charges against both Theo Mosely and his wife, Hazel Mosely. The two offenses in this case, with which Mosely and wife are charged in the second count of the Information, are two separate offenses relating to the same subject matter, it is true; but each nevertheless is a separate and distinct offense, and therefore, under the rules aforesaid, not joinable in the same count against *two* Defendants.

The offenses charged in the Information are not of the same or similar character, and not based on the same act or transaction, but are two separate offenses charged against two Defendants in one and the same count.

The Information fails to show on its face that the conduct charged involved any amounts of money that would require the payment by the Defendant of a special tax, that the law relied upon embraces; as distinguished from its registration tax.

The Information fails to show that the *lottery* referred to therein was a *lottery* that was being carried on and conducted within the jurisdiction of the Court.

The Information fails to show that the act or acts purporting to be charged against the Defendants therein, occurred after the effective date of the law involved. The Information, on its face, shows that the acts informed against did not occur within the time application of the law involved; and it fails to charge the required time element concerning the operation of the lottery so as to show that the acts involved come within the effective date of the law being applied.

This Information illegally charges two offenses in the

one count, contrary to Rule 8, Federal Rules of Criminal Procedure.

The provisions of Section 3290, Title 26, USC, requires the payment of the tax. One offense. The provisions of Section 3291, Title 26, requires registration. Another offense. Each is a separate offense.

It will be noted that in charging an offense under Section 3291, *supra,* in addition to registering name and place of residence, the registrant must also include additional matter, as required in subsections 2 and 3. We take it that the offense contemplated will not have been completely charged, unless the Information includes the one or the other of these subsections. Also that a charge for violating this Section 3291 should include language showing which of the subsections was violated by the alleged non-registering offender. An Information that fails to contain the specific and particular charges above pointed out, is vague and indefinite, and the Information in this case is totally lacking in these important and material showings. A conviction under this second count should not be permitted to stand. The vice of vagueness in criminal Informations is the *treachery* they conceal with respect to determining or making known what matters are included, or what acts are prohibited.

U. S. v. *Cardiff,* 343 U. S. 940, 96 L. Ed. 1346.

From the Transcript of Record before the Supreme Court, it is made to appear in this case that the Prosecution was not upon complaint, but on an order made by the U. S. District Court "to file Information and issue capias" (Page 2, Transcript of Record).

Between the time of the making of this order for capias, and the Defendant's arrest, the so-called confession was obtained from the Petitioner by Treasury Agents, prior even to the Court's order for *the filing of an Information,*

and of course prior to his arraignment and plea. This sort of procedure violates the requirements of Federal Rules of Criminal Procedure 3, 4 and 7. The Information in this case was never supported by the oath of the U. S. Attorney, who signed it, and we believe that it should have been sworn to—*if it is otherwise valid*—before any warrant of arrest could properly have issued against the Petitioner, or Defendant (Federal Rules of Criminal Procedure, Rule 9) (See Section 3045, Title 18, USCA).

As to Question (5)

THE C.C.A., UPON BEING ADVISED IN THE PETITION FOR REHEARING, (PAGES 53 TO 62, 61 TRANSCRIPT OF RECORD), THAT THE SUPREME COURT OF FLORIDA HAD REVERSED THE CONVICTION OF THE DEFENDANT THEO MOSELY BY THE STATE TRIAL COURT, ON THE GAMBLING CHARGE UPON WHICH HIS ALLEGED FEDERAL CRIME WAS PREDICATED, SHOULD HAVE ORDERED A NEW TRIAL IN ORDER TO PERMIT HIM TO FILE HIS "NOT GUILTY" PLEA.

The Petition for Rehearing (Pages 58 to 61 of Transcript of Record) presented to the C. C. A. a showing that Petitioner was acquitted by judgment of the State Court of Florida (Page 61, Transcript of Record) of the charge made under State Law of "carrying on the occupation of accepting wagers". This alleged criminal offense being the conduct and wagers upon which the Federal Information involved predicates, presages, and presupposes its charge of "failure to register" and "failure to pay the special tax"; such acquittal taking place after the Circuit Court of Appeals had rendered its first decision (Page 52, Transcript of Record) in the case. The acquittal in the State Court is shown in a copy of the Florida Supreme Court judgment (Page 61, Transcript of Record); and was entered on November 17, 1953, upon an appeal to said State Supreme Court of the Defendant's trial, and conviction, in the State Court. At the time of Petitioner's trial and conviction in the Federal Court here involved, the State Trial

Court had convicted Petitioner upon said State charge; Petitioner's appeal to the State Supreme Court of such conviction was in progress at the time of such trial, and conviction, in the Federal Court. In other words, when Petitioner was convicted in the Federal Court, he stood convicted in the State Trial Court, which State Court conviction, having been apealed to the State Supreme Court, was reversed as shown by the judgment of said Florida Supreme Court aforesaid (Page 61, Transcript of Record). This reversal and acquittal by the Supreme Court of Florida did not occur in time to be shown to the C. C. A. until the filing of the Petition for Rehearing in this case, which Petition is shown beginning on Page 53 of the Transcript of Record, as heretofore pointed out.

This Petitioner respectfully contends that, after such acquittal, it was error for the C. C. A. to deny him a rehearing, and to refuse him an order for a retrial in the Lower Court.

WE GO OUTSIDE OF THE RECORD NOW BEFORE THE SUPREME COURT OF THE UNITED STATES, APOLOGETICALLY, TO MAKE THE FOLLOWING STATEMENT, BUT WE DO IT IN ORDER THAT THE COURT MAY KNOW OF PETITIONER'S EFFORT SEEKING TO AVOID THE NECESSITY OF THIS APPLICATION FOR CERTIORARI, TO-WIT:

Following the United States Court of Appeals' denial of the Petition for Rehearing, aforesaid, Theo Mosely filed, under Rule 33 of the Federal Rules of Criminal Procedure, a motion for a new trial with the District Court of the Southern District of Florida, on the grounds of "newly discovered evidence." A copy of this motion is attached hereto in the appendix, identified as Appendix A; this new evidence being the reversal by the Supreme Court of Florida of the State Trial Court's conviction, aforesaid.

We trust that the Supreme Court of the United States will here observe that Theo Mosely was convicted in the United States District Court in this case without proof of

having conducted gambling operations in violation of any State Law, and while his prosecution in the State Court for so doing was still in progress; this having been made possible by his plea of "nolo contendere" filed in the Federal Court when the U. S. Attorney held before the U. S. District Trial Court the alleged confession. This conviction in the Federal Court was predicated upon his assumed guilt under the alleged confession. All of which would seem, in itself, to present an appropriate case for the Certiorari Writ here being sought, in order that a new trial may be granted him that would give him the opportunity in the Federal Court before a Jury, of disproving these alleged State charges, and receiving the Federal Court's acquittal therefrom, as he has been so acquitted by the State Court. We believe this State Court's acquittal, in itself, disproves the verity of his alleged confession, obtained by the Federal Officers.

The alleged confession by Theo Mosely was obtained by Federal Treasury Officers some time prior to July 9, 1952; this date being the date of his U. S. District Court trial in this case. At the time of such U. S. District Court trial, the Judge refused to require this so-called confession to be produced in the case, although the Judge knew of its existence, and knew that the U. S. District Attorney had threatened its use just prior to the case coming for trial, and had shown the confession to Mosely's Counsel, without permitting a copy to be made, only a few minutes before Mosely was called upon to enter his plea to the Information. The U. S. Trial Court permitted the Government Agent, and the U. S. Attorney to refuse to furnish Defendant's Attorney with this alleged confession; knowing all of this when the Trial Court in the case at bar refused to inquire into the genuineness and legality of the alleged confession; such refusal was a pure abdication by the Judge of his duty to inquire into the validity thereof,

and amounted to the Court's allowing this alleged confession to accomplish the Defendant's conviction, and to deprive Defendant of entering the "not guilty" plea that was offered. All of this appears in the record that was before the C.C.A., and would seem to have called for the ordering of a new trial by it.

As to Question (6)

THE FEDERAL LAW INVOLVED VIOLATES THE CONSTITUTION OF THE STATE OF FLORIDA

This law calls for self incrimination and imposes double jeopardy. The accused, under it, is being compelled to be a witness against himself, and is deprived of liberty and property thereby, without due process, in violation of the civil rights provisions of Section 12 of the Bill of Rights in the Constitution of the State of Florida.

Said law is a bill of attainder, and ex poste facto law in violation of the provisions of Section 17 of the Bill of Rights of said Constitution.

As to Question (7)

THE FEDERAL LAW INVOLVED VIOLATES THE CONSTITUTION OF THE UNITED STATES

We are aware that the Supreme Court of the United States, on March 9, 1953, announced its decision in *U. S.* v. *Kahriger,* 97 L. Ed. 754; 345 U. S. 22, 73 Sup. Ct. 510, and that the syllibi to its opinion in this case announces the numerous points that it decided. There are points, however, which are not so decided, that we give as our reasons here for contending for the unconstitutionality under the Federal Constitution of this anti-gambling law; and we also make note of the fact that since the rendition of that decision, the membership of the Court has changed, and that in its rendition there were three dissents, Messrs. Justice Frankfurter, Black and Douglas, and one near dissent by

Mr. Justice Jackson. It is also established precedent for the Supreme Court of the United States, as well as the Courts of last resort of our States, to reverse themselves by subsequently changing previous rules of decision.

In the case at bar, the law involved affects this Appellant in its application to the facts, as a bill of attainder, retroactive and ex poste facto; such law exercised legislative power of that character to the fact of conducting gambling in this case, because it was made so quickly applicable to a Defendant for alleged conduct of gambling, which conduct was necessary to have been committed—if committed—at a time prior to the effective date of said law. Grounds of our motion to dismiss the Federal Information, as set forth on Pages 6, 7 and 8 of the Transcript of Record, give the foundation for this objection. This Federal Act did not become effective until November 1, 1951, and inasmuch as the Federal charge here involved, is alleged in the Information to have been committed during November, 1951, the Defendant had to be engaged in the doing of that which these Federal laws apply to; namely, gambling in the State prior to November 1, 1951. Defendant had to be engaged in the placing of wagers on or after the first day of the first month which began more than 10 days after the date of enactment and prior to the "first day of the first month", or before November 1, 1951; the Federal Law itself not becoming effective until November 1, 1951. All of which adds up to the necessary conclusion that charged, as the Defendants were, in the Information for the Federal Law violation involved, means that the wagering conduct upon which the Federal charge is predicated, had to be in progress prior to the date that the Federal Law became effective, or in other words, at a time when the said Federal Law, creating the crime involved in the Federal prosecution, did not exist; thereby giving the retroactive and ex poste facto effect.

We respectfully contend that a law which reaches back

prior to the date of its effectiveness, and makes a crime of conduct previously committed, is a pure bill at attainder, both ex poste facto and retroactive, relating to gambling conduct previous to its enactment. We respectfully cite notes following Sections 3290 and 3291, Title 26, USCA, entitled "effective date"; also a note following Section 3285, Title 26, USCA, likewise entitled "effective date."

Congress cannot license that which the State prohibits being done by its law. Article 3, Section 23 of the Florida Constitution prohibits that which this Federal Law licenses.

The Federal Act involved is not within the incidental powers of Congress, and is otherwise in violation of Article 1, Section 3, Clause 18 of the Federal Constitution.

Said law is in violation of Article 4, Section 14 of the Federal Constitution, in that it does not give full faith and credit to the public acts of the State of Florida.

Said law is in violation of Article 4, Section 4 of the Federal Constitution, in that it disregards the guarantee of a Republican form of government to the States by giving legality to conduct which the State, by its police regulations, has made illegal.

Said law is a direct tax not authorized by law, and in violation of Section 9, Article 1 of the Federal Constitution.

Said law is a bill of attainder in violation of Article 1, Section 9, sub-paragraph 3 of the Federal Constitution.

Said law is a form of taxation and licensing that is not authorized under the Constitution of the United States to be imposed by Congress.

Said law is a revenue bill, and did not originate in the House of Representatives of Congress, and, as such, violates Article 1, Section 7 of the Federal Constitution.

Congress has no power to punish for crimes committed within the State that are not of interstate vicenage or character.

The licensing power, attempted to be used in said law, is

reserved to the States by the Federal Constitution in the Tenth Amendment thereof.

Persons violating said Federal Law are being twice put in jeopardy of life and limb, because of State Law making the offense, licensed thereunder, criminal; being by the same token deprived of liberty without due process in violation of the Fifth Amendment of the Federal Constitution.

Conclusion

The various matters hereinabove submitted, in support of the Certiorari Writ requested from the Supreme Court, have all been previously submitted to the Circuit Court of Appeals (See Motion of Defendants for bill of particulars, Page 4, Transcript of Record; motion of Defendants to dismiss, Page 6 of Transcript of Record; motion of Defendants for severance, Page 9 of Transcript of Record; motion of Defendants to suppress confession, Page 15, Transcript of Record; motion of Defendant for new trial, Page 37, Transcript of Record; Petition filed in the Circuit Court of Appeals for Rehearing, Page 53 Transcript of Record.

Final Asking

It is respectfully submitted that this case presents a question, or questions, of genuine, and in some instances, even transcendent, importance in the application of the protective scope of due process requirements in both State and Federal Constitutions, and for that, tied in with the specific reasons set forth in this Petition, this Petition for Writ of Certiorari from the Supreme Court of the United States to the Circuit Court of Appeals of the United States, Fifth Circuit, should be granted.

Respectfully submitted.

J. Tom Watson,
Counsel for Petitioner.

APPENDIX "A"

MOTION FOR A NEW TRIAL—November 25th, 1953

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES

vs.

THEO MOSELY, DEFENDANT

MOTION

The Defendant aforesaid, moves the Court for a new trial under Federal Rules of Criminal Procedure No. 33, and as grounds therefor assigns the discovery of new evidence, to-wit: the decision of the Supreme Court of Florida dated November 17, 1953, wherein and whereby this Defendant is acquitted of the crime upon which the Information in the instant case is predicated. A copy of the said opinion of said Supreme Court of Florida, constituting such new evidence, being hereto attached and identified as Defendant's Exhibit 1.

(S.) J. TOM WATSON,
Counsel for Defendant.

CERTIFICATE OF SERVICE—November 25th, 1953

I hereby certify that a copy of the foregoing Motion was this day mailed to United States Attorney, in the manner required by law.

(S.) J. TOM WATSON,
Counsel for Defendant.

APPENDIX "B"

OPINION OF THE SUPREME COURT OF THE STATE OF FLORIDA—Filed November 17th, 1953

IN THE SUPREME COURT OF FLORIDA JUNE TERM, A. D. 1953
SPECIAL DIVISION B

Case No. 24,298

THEO MOSELY and HAZEL MOSELY, APPELLANTS,

vs.

STATE OF FLORIDA.

An Appeal from the Criminal Court of Record for Polk County, R. H. Amidon, Judge.

J. Tom Watson, for Appellants.

Richard W. Ervin, Attorney General, Mark R. Hawes, Assistant Attorney General, for Appellee.

PER CURIAM

After a thorough consideration of the records and briefs we have reached the conclusion that the judgment against the defendant, Hazel Mosely, should be affirmed. The conviction against the defendant, Theo Mosely, rests entirely upon circumstantial evidence and this evidence is not sufficient to exclude every other reasonable hypothesis except that of the guilt of said defendant. Consequently, the judgment rendered against Theo Mosely should be reversed.

It is so ordered.

ROBERTS, C. J., SEBRING, HOBSON and DRES, JJ., CONCUR.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 527

THEO MOSELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 50-51) is reported at 207 F. 2d 908.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1953 (R. 52), and a petition for rehearing (R. 53-62) was denied on December 10, 1953 (R. 63). The petition for a writ of certiorari was filed on January 7, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying petitioner's motion to withdraw his plea of *nolo contendere* on the ground that he had given an involuntary confession, where he had entered such plea after the case had been called for trial, upon the advice of personally selected counsel who at that time was apprised of the existence of the confession.

2. Whether the offense of failing to pay a gambling tax as required by 26 U.S.C. 3290 and 3291 is a misdemeanor which could be charged by information.

3. Whether the information charged an offense.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 10-13.

STATEMENT

On July 9, 1952, petitioner and a co-defendant were convicted, upon their respective pleas of *nolo contendere* (R. 13), in the United States District Court for the Southern District of Florida on count two of an information, which charged that they, being engaged in the occupation, as defined in 26 U.S.C. 3285(b)(1)(C), of accepting "wagers placed in a lottery conducted for profit," "did willfully, during the month of November, 1951, * * * fail to register and pay the special tax required" by 26 U.S.C. 3290 and 3291 (R. 4).[1] At the time

[1] Count one (R. 3), which, except for the element of wilfullness, charged the same offense as count two, was dismissed on motion of the Government (R. 14).

the case was called for trial, July 9, 1952, petitioner, who was present with his counsel, was arraigned and entered a plea of *nolo contendere* (R. 11-13). The following is the pertinent portion of that proceeding (R. 11-14):

> Mr. O'BRIEN: If it please the Court, these defendants have not yet been arraigned. I would like to hold the arraignment at this time. Mr. Watson represents the defendants.
>
> * * * * *
>
> Mr. O'BRIEN: Please listen to the information. (Thereupon the information was read to defendants by Mr. O'Brien). How do you plead?
>
> Mr. WATSON: I ask the Court to accept the plea, under certain peculiar conditions that exist with reference to these two people of a State charge pending against them, I ask your Honor to accept the plea of nolo contendere temporarily and withhold sentence temporarily.
>
> The COURT: I can not do that temporarily, Mr. Watson. It is now or not.
>
> Mr. WATSON: Then I ask your Honor to enter a plea of nolo contendere. I will explain my reasons for it.
>
> The COURT: It will not be necessary to explain your reasons. Do they understand that the Court will sentence them under the plea of nolo contendere the same as if they plead guilty; you have explained that to them.
>
> Mr. WATSON: Yes, your Honor.

Mr. O'BRIEN: The Government will accept the plea, your Honor.

* * * * *

The COURT: * * *.

The order of the Court is that these defendants will be referred to the Probation Officer for pre-sentence investigation, and they will report now to the Probation Officer.

On August 22, 1952, before sentence had been imposed, petitioner and his co-defendant filed a motion for leave to withdraw their pleas of *nolo contendere* and a motion for the production and suppression of their confessions (R. 14-16). It was alleged therein that, shortly before the case was called for trial, petitioner's counsel learned for the first time, through the United States Attorney, that petitioner and his co-defendant had previously given written confessions relative to the case; that after seeing the confessions, he advised them to plead as they did; and that thereafter he conferred with them and was advised that the confessions were obtained under duress (R. 15-16).

On August 27, 1952, at a hearing on the motions, the Government opposed the motion for withdrawal of the pleas on the ground that it had been prepared to go to trial, which was scheduled for the date on which the pleas were entered, and that it would not be "in the best interests of justice" to require the Government to "reassemble the witnesses, the data, and everything else because of information which Mr. Watson could very well have determined prior

to the trial" (R. 19). Petitioner's counsel reiterated the allegations contained in the motion papers (R. 19-20). The trial court, after noting that petitioner's counsel had failed to ask for a continuance at the time he allegedly first learned of the existence of the confessions, denied the motion for withdrawal of the plea (R. 21-22). The trial court further noted that, at the date of petitioner's plea, his counsel, an "astute" and "experienced lawyer," had stated that he intended to defend petitioner and his co-defendant at a trial on a local charge and that he "didn't want the State Court to have access to these confessions or to a judgment of guilt over here" (R. 23, 24).

In denying the motion for suppression of the confessions, the trial court stated (R. 25):

> * * * I haven't seen the confessions, or know anything about them. They are not in my jurisdiction. They haven't been in evidence.

On the same date, petitioner was sentenced to imprisonment for a period of one year and to pay a $2,000 fine (R. 28, 35-36); and his co-defendant was put on probation (R. 27).

On April 1, 1953, the trial court, after a hearing, denied petitioner's motion for rehearing (R. 40-41). On appeal,[2] the Court of Appeals for the Fifth Circuit, after finding no abuse of discretion by the trial court in denying petitioner's motion for withdrawal of his plea and "no reversible error in the record", affirmed (R. 51).

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[2] Petitioner's co-defendant did not seek an appeal.

ARGUMENT

1. Petitioner's contention (Pet. 9-10), that the trial court abused its discretion in denying his motion for leave to withdraw his plea of *nolo contendere,* is without merit. The law is well settled that the issue upon such motion is, not the guilt or innocence of the defendant, but whether the plea was entered in justifiable ignorance of his rights or the consequences of his action, or was the result of fear, coercion, fraud, mistake or inadvertence "such as would justify the court in concluding that it ought not to be permitted to stand." *Friedman* v. *United States,* 200 F. 2d 690, 696 (C.A. 8), certiorari denied, 345 U.S. 926; *Kercheval* v. *United States,* 274 U.S. 220, 224; *United States* v. *Shneer,* 194 F. 2d 598, 600 (C.A. 3); *Williams* v. *United States,* 192 F. 2d 39, 40 (C.A.5).[3]

Petitioner has shown no such circumstances. He was represented by a personally selected counsel, whose competency the trial court recognized and he himself does not challenge. He does not dispute that his plea was voluntarily made. The record clearly shows that it was made unconditionally, for the trial court specifically refused to enter it "temporarily." It was accepted only after petitioner's counsel told the court that petitioner understood that he would be sentenced thereon. Petitioner's asserted reason for entering a *nolo contendere* plea,

---

[3] The fact that petitioner's motion for withdrawal was made before sentence had been imposed did not give him any greater right to a withdrawal of his plea. See *Williams* v. *United States,* 192 F. 2d 39 (C. A. 5); *Goo* v. *United States,* 187 F. 2d 62 (C.A. 9), certiorari denied, 341 U.S. 916; *United States* v. *Colonna,* 142 F. 2d 210 (C.A. 3).

as the trial court found, was his desire to keep his confession and judgment of guilt in the federal court from becoming available to the state court, where he expected to go to trial. Thus, the entry of his plea in the federal court was calculated strategy to risk the consequences of a conviction therein in the hope of acquittal in the state court.[4] Significantly, counsel did not ask for a continuance on the ground that, having just learned of the confession, he needed time to investigate the circumstances. There is therefore no substance to petitioner's claim that entry of the plea was the only manner of gaining time to determine the validity of the confession.[5]

2. Petitioner's contention (Pet. 10-12), that the information upon which he was convicted was void as charging a felony, is frivolous. The information charged petitioner with willful failure to register and pay the special tax required under 26 U.S.C. 3290 and 3291. Section 3294(c) applies to such willful violations the penalties prescribed in 26 U.S.C. 2707. The relevant portion of section 2707 is subdivision (b), which relates to the payment of special taxes and specifically defines as "a misdemeanor" the offenses embraced therein. See *Spies* v. *United States,* 317 U.S. 492. Clearly 26 U.S.C. 2707(c), upon which petitioner relies (Pet. 12), is

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[4] The reversal of petitioner's state court conviction (See Pet. 15-18) is clearly no evidence that petitioner's plea was not knowingly made.

[5] Since petitioner's conviction was not predicated upon the confession but upon his voluntary plea, the trial judge was not required, on the motion for withdrawal, to adjudicate the voluntariness of the confession. And since petitioner admits (Pet. 14) that his confession was made before he was arrested, it is clear that the rule of *McNabb* v. *United States,* 318 U.S. 332, would have been inapplicable.

inapplicable, for it explicitly applies to persons, such as employers and others, who are required "to collect, account for and pay over" certain taxes, as distinguished from persons required to pay such taxes in the first instance. Cf. *Kellems* v. *United States*, 97 F. Supp. 681 (D. Conn.).

3. The information charges, in plain and concise language, all the essential elements of the offense, namely that petitioner, being a person required to register and pay a special tax under the statute, wilfully failed to do so during November 1951. It does not, as petitioner claims (Pet. 19-20), charge as an offense an act occurring prior to the effective date of the statute, which was November 1, 1951. See Section 472 of the Act of October 20, 1951, 65 Stat. 531-532. The information charged failure to pay such tax "during the month of November, 1951", i.e., after November 1.

The argument that the information is duplicitous in charging both failure to register and failure to pay the special tax amounts to a complaint that petitioner has been sentenced for one offense when he might have been sentenced for two. Since the allegations are joined conjunctively, the information is not duplicitous. See *Crain* v. *United States*, 162 U.S. 625; *District of Columbia* v. *Hunt*, 163 F. 2d 833, 838 (C.A.D.C.); *Price* v. *United States*, 150 F. 2d 283, 284-285 (C.A. 5); *Troutman* v. *United States*, 100 F. 2d 628, 631 (C.A. 10); *Poffenbarger* v. *United States*, 20 F. 2d 42, 48 (C.A. 8).[6]

[6] The constitutionality of the statute involved herein has been upheld by this Court too recently to require any discus-

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys.

MARCH, 1954.

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sion of petitioner's attack (Pet. 18-21) on it on such grounds. *United States* v. *Kahriger*, 345 U.S. 22. See also *Combs* v. *Snyder*, 101 F. Supp. 531 (D.D.C.), affirmed, 342 U.S. 939. Since the statute clearly is prospective in its operation, his attack (Pet. 19-20) on the ground that it is *ex post facto* is without merit.

APPENDIX

26 U.S.C. [Supp. V] 3285, which is part of Subchapter A of Chapter 27-A of the Internal Revenue Code, provides in pertinent part:

(a) *Wagers.*

There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) *Definitions.*

For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers-game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

26 U.S.C. [Supp. V] 3290, which is part of Subchapter B of Chapter 27-A of the Internal Revenue Code, provides:

Tax.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. [Supp. V] 3291, which is part of Subchapter B of Chapter 27-A of the Internal Revenue Code, provides:

Registration.

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district——

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

26 U.S.C. [Supp. V] 3294, which is part of Subchapter B of Chapter 27-A of the Internal Revenue Code, provides in pertinent part:

(c) *Willful violations.*

The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

26 U.S.C. [1946 ed.] 2707 provides in part as follows:

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person required under this sub-

chapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution.

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